No. 11173

United States

Circuit Court of Appeals

For the Ninth Circuit.

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA and A. W. YOUNG,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

ROGER S. FOSTER, Solicitor

18th and Locust Streets

Philadelphia 3, Pa.

HOWARD A. JUDY,

Room 1301, 625 Market St.

San Francisco 5, Calif.

G. MORGAN CUTHBERTSON,

Room 1737, 312 N. Spring St.

Los Angeles 12, Calif.

For Appellee:

MORRIS LAVINE

619 Bartlett Bldg.

Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 2863-P.H.—Civ.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA,

Respondent.

AFFIDAVIT IN SUPPORT OF RULE TO SHOW CAUSE WHY A. W. YOUNG, SECRETARY-TREASURER, PENFIELD COMPANY OF CALIFORNIA, SHOULD NOT BE ADJUDGED IN CONTEMPT

State of California,
County of Los Angeles—ss.

Charles R. Burr, being first duly sworn, does on oath depose and say that:

I.

On April 13, 1943, there was filed in this Court by the Applicant (hereinafter referred to as the Commission) a document entitled "Application for Order to Require Witness to Appear and Produce Documentary Evidence," which recited, among other things, that the Commission had on May 14, 1942, pursuant to Section 20(a) of the Securities

Act of 1933, as amended (15 U.S.C. 77t(a)), ordered that an investigation be made as to the facts and circumstances concerning possible violations by Bourbon Sales Company and others of Sections 5(a) and 17(a) (18 U.S.C. § 77(e) and 77(q)) of said Act. The application [2] further alleged that the Commission, on April 8, 1943, amended its order of May 14, 1942, by extending the investigation to also cover facts and circumstances concerning alleged violations by Penfield Company of California of the aforementioned Sections of the Act. It was further alleged that the said Commission orders of May 14, 1942, and April 8, 1943, pursuant to the provisions of Section 19(b) of said Act (15 U.S.C. 77(s) (b)), appointed officers for the purpose of that investigation and empowered them to administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books, papers, correspondence, memoranda, and records deemed relevant to the inquiry.

II.

It was further alleged in said Application that, pursuant to the powers and duties arising from the aforementioned Commission orders, C. J. Odenweller, Jr., a duly designated officer of the Commission, thereafter caused to be issued a subpoena duces tecum requiring the production before him of certain described books and records of the Penfield Company of California, at 1737 United States Post Office and Courthouse Building, Los Angeles, California, on the 10th day of April, 1943, at 10:00

o'clock A.M., and that service of said subpoena was made on April 10, 1943, by personal delivery of a duplicate original thereof to the Attorney for the Penfield Company of California, who agreed to accept service for said company.

III.

It was further alleged in said Application that the Penfield Company of California refused to appear and produce the books and records as specified and required in the aforementioned subpoena duces tecum and that by such refusal the Penfield Company of California had impeded and was continuing to impede the progress of the Commission's investigation.

IV.

Upon the filing of the Application, as aforesaid, an order was issued by this Court, directed to the Penfield Company of California, to appear before the Honorable Peirson M. Hall, Judge of the above-entitled Court in the City of Los Angeles on the 19th day of April, 1943, and then and there show cause why [3] an order should not issue as prayed in said Application.

V.

On the 19th day of April, 1943, said Application came on regularly for hearing before the Honorable Peirson M. Hall, Judge presiding, and such proceedings were had that the Court thereafter, on June 1, 1943, ordered A. W. Young, Secretary-Treasurer of the Penfield Company of California, to appear before C. J. Odenweller, Jr., on the 8th

day of June, 1943, and at any adjournments thereof as might be determined from time to time, then and there to produce the books and records of the Penfield Company of California as described in said order. The said order of June 1, 1943, further ordered that, in accordance with the stipulation and agreement of the parties made in open court, the books and records as aforesaid, in lieu of their physical production, should be made available to such officer and employees of the Commission as might be designated for such purpose at the office of the Penfield Company of California in Los Angeles, California.

VI.

Appeal from the said order of this Court on June 1, 1943, was noted by the Penfield Company of California on June 1, 1943, and on the same day proceedings to enforce said order were stayed pending final determination of said appeal.

VII.

On November 13, 1944, the mandate of the Circuit Court of Appeals for the Ninth Circuit was issued affirming the said order of this Court dated June 1, 1943, and on December 7, 1944, the said mandate was ordered filed and spread upon the minutes of this Court.

VIII.

On January 16, 1945, the order of investigation of the Commission of May 14, 1942, was further amended by the designation of Charles R. Burr, your affiant, and Leo J. Sherman as additional

officers of the Commission, for the purpose of conducting such Commission investigation. A copy of said Commission amended order, dated January 16, 1945, is annexed hereto, marked Exhibit A, and made a part hereof.

IX.

On January 16, 1945, your affiant, pursuant to the authority conferred [4] upon him under the order of the Commission dated January 16, 1945, addressed and caused to be deposited in the United States mails, a communication to A. W. Young, Secretary-Treasurer of the Penfield Company of California, in the form and content of Exhibit B hereto, annexed and made a part hereof, advising said A. W. Young that your affiant would call at the offices of the Penfield Company in Los Angeles, California, on January 24, 1945, for the purpose of examining the books and records referred to in the order of this Court dated June 1, 1943, a copy of which order was enclosed in said letter. Copies of affiant's letter and enclosure were mailed to A. W. Young at 683 Kelton Avenue, West Los Angeles, California; Morris Lavine, Esq., 20 Bartlett Building, Los Angeles, California; Francis A. Reilly, Esq., 6233 Hollywood Boulevard, Hollywood, California; and Flanagan, Wilson & Thomas, attention of Philip L. Wilson, Jr., 453 South Spring Street, Los Angeles, California.

X.

On January 24, 1945, affiant, together with Leo J. Sherman, the other officer designated in the

aforementioned Commission's amended order of January 16, 1945, presented themselves at the office of the Penfield Company of California in Los Angeles, California, and demanded to see the books and records referred to in the order of this Court dated June 1, 1943, but such demand was refused.

CHARLES R. BURR.

Subscribed and sworn to before me this 24th day of January, 1945.

[Seal] G. M. CUTHBERTSON,

Notary Public in and for the County of Los Angeles, State of California. [5]

EXHIBIT A

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 16th day of January, A. D. 1945

In the Matter of

Bourbon Sales Corporation, Penfield Company, L. M. Ulmsted, Eugene Tereny, Harold C. Jordan, Donald F. Crow, Glen A. Tanner, Frank Black, K. A. Shropshire, A. W. Young, Penfield Company of California.

SUPPLEMENTAL ORDER DIRECTING INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY

I.

On May 14, 1942, the Commission issued an order directing an investigation of Bourbon Sales Corporation, Penfield Company, L. M. Ulmsted, Eugene Tereny, Harold C. Jordan, Donald F. Crow, Glen A. Tanner, Frank Black and K. A. Shopshire to determine whether they had violated the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933, which order was supplemented on February 13, 1943, by naming an additional officer to conduct the investigation. On April 8, 1943, the Commission further supplemented its order and added A. W. Young and the Penfield Company of California as respondents. The order was further supplemented on July 19, 1944, when the Commission named an additional officer to conduct the investigation.

II.

It Is Hereby Ordered that the order and supplemental orders of the Commission mentioned in paragraph I hereof be and they hereby are further amended by designating Charles R. Burr and Leo J. Sherman as additional officers of the Commission.

By the Commission.

(Signed) ORVAL L. DUBOIS,
Secretary. [7]

EXHIBIT B

LAB:JLT/U

12

January 16, 1945

Mr. A. W. Young
Secretary-Treasurer
The Penfield Company of California
1427 South Robertson Boulevard
Los Angeles, California

Re: Securities and Exchange Commission v. The Penfield Company of California, Civil Action No. 2863 in the District Court of the United States for the Southern District of California, Central Division.

Dear Sir:

As doubtless you have been advised, the mandate of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court in the above-entitled matter, was filed and entered upon the records of the District Court on December 7, 1944.

The undersigned, by and under the direction of the Securities and Exchange Commission, will call at the office of the Penfield Company at 10:00 o'clock on the morning of Wednesday, January 24, 1945, for the purpose of examining those books and records referred to in the Order of Judge Peirson M. Hall, dated June 1, 1943, which constituted the

judgment above referred to. A copy of Judge Hall's Order is inclosed.

Yours very truly,

(Signed) CHARLES R. BURR,
Assistant Regional Administrator. [8]

ccs: A. W. Young
683 Kelton Avenue
West Los Angeles, California

Morris Lavine, Esq.
620 Bartlett Building
Los Angeles, California

Francis A. Reilly, Esq.
6233 Hollywood Boulevard
Hollywood 28, California

Flanagan, Wilson & Thomas
Attention Philip L. Wilson, Jr.
453 South Spring Street
Los Angeles, California [9]

EXHIBIT B (ENCLOSURE)

Copy

Edward H. Cashion, Counsel; John F. Davis, Solicitor; C. J. Odenweller, Jr., Regional Administrator; James M. Evans, Attorney, Attorneys for Applicant, Securities and Exchange Commission, Room 1737, United States Post Office and Courthouse, Los Angeles, California.

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 2863-P.H.—Civ.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA, a California Corporation,

Respondent.

ORDER

This Cause came on to be heard on return of a rule to Show Cause why the Respondent should not be required to comply with a subpoena duces tecum, a copy of which is attached to the Application herein as Exhibit C.

Upon the pleadings, the evidence, and the statement and briefs of counsel for the parties herein, the Court finds that the Applicant has made sufficient and reasonable showing entitling it to have its subpoena duces tecum enforced and to have produced, pursuant thereto, the books, records and documents hereinafter set forth, which are germane to the subject matter of the investigation instituted by the Applicant pursuant to Section 19(b) of the Securities Act of 1933, (15 U.S.C. §77 s(b)) and which are material and relevant to such inquiry.

It Is Therefore Ordered that A. W. Young, Secretary-Treasurer of The Penfield Company of California, appear before C. J. Odenweller, Jr., an officer of Securities and Exchange Commission, or such other person or persons as may be designated by Securities and Exchange Commission, on the 8th day of June, 1943, and at any adjournments thereof as determined by said officer or employee of Securities and Exchange Commission, at Room 1737 of the United States Post Office and Courthouse, Los Angeles, California, and to produce the following books, papers and documents of The Penfield Company of California and relating to the business carried on and conducted by the said The Penfield Company of California:

1. Minute Book

2. All stock certificate stub books and cancelled certificates of common and preferred stock.

3. Alphabetical list of stockholders and addresses (if not shown on stub books indicated in Item No. 2 above.)

4. General ledger.

5. Cash book.

6. General journal.

7. Records reflecting the sale of whiskey and/or whiskey warehouse receipts by the corporation. [11]

8. Records relating to the sale of bottling contracts of Bourbon Sales Corporation, Louisville, Kentucky, by the corporation.

9. Records relating to the sale of bottling contracts of The Penfield Company of California, by the corporation.

10. Correspondence files, including letters received from and copies of letters sent to, all stockholders of The Penfield Company of California.

11. Correspondence files containing letters received from, and copies of letters sent to, all persons to whom bottling contracts of Bourbon Sales Corporation or The Penfield Company of California were sold.

12. All cancelled checks of the Corporation.

13. Copies of confirmation or advices delivered in connection with the sale of stock of The Penfield Company of California or the sale of bottling contracts of Bourbon Sales Corporation, or The Penfield Company of California.

14. All original journal entries or journal vouchers supporting entries appearing in the general journal or cash books.

15. Copies of all prospectuses, sales material, sales letters, material in saleman's kits or similar documents used in connection with the solicitation and sale of stock in The Penfield Company of California.

16. Copies of all prospectuses, sales material, sales letters, material in salesmen's kits or similar documents used in connection with the sale of bottling contracts of Bourbon Sales Corporation of The Penfield Company of California.

17. Purchase invoices or records supporting the acquisition of whiskey, whiskey warehouse receipts or bottling contracts by The Penfield Company of California from private individuals for cash or in exchange for stock, bottling contracts or other securities. [12]

18. Purchase invoices or other records supporting the acquisition of whiskey or whiskey warehouse receipts from distillers, whiskey warehouse receipts brokers or other persons or companies engaged in the whiskey business.

19. Sales invoices or records supporting the disposition of whiskey, whiskey warehouse receipts or bottling contracts procured from investors.

20. Employment or other records showing names of all employees, of salesmen or other personnel with last known addresses.

It Is Further Ordered, that in accordance with the stipulation and agreement of the parties made in open court, that the books, papers and documents herein ordered to be produced, as aforesaid, in lieu of their physical production, as heretofore ordered, shall be made available to such officer and employees of Securities and Exchange Commission as may be designated, at the office of Respondent, at 8900 Beverly Boulevard, Los Angeles, California.

Jurisdiction of the Cause is written for the purpose of giving full effect to this Order and for the purpose of making such other and future Orders and Decrees, or taking such other action, if any, as

may become necessary or appropriate to carry out and enforce this Order.

Dated: June 1st, 1943.

PEIRSON M. HALL,
United States District Judge.

Approved as to form.

FRANCIS A. REILLY,
Attorney for Respondent.

[Endorsed]: Filed Jan. 24, 1945. [13]

[Title of District Court and Cause.]

ORDER

Upon reading and considering the verified "Affidavit for order to Adjudge A. W. Young, Secretary-Treasurer of the Penfield Company of California, in Contempt," this day filed in the above entitled action, and good cause being shown thereby;

It Is Ordered that A. W. Young, Secretary-Treasurer of the Penfield Company, appear before the undersigned Judge of the above entitled Court, in the United States Courthouse in the City of Los Angeles, California, on the 5th day of February, 1945, at 2:00 o'clock, P.M. of that day, or as soon thereafter as the matter may be heard, and show cause, if any there be, why a further order should not be made herein, ordering and directing said A. W. Young, Secretary-Treasurer of the Penfield Company to show cause why an order should not

be made holding said A. W. Young in contempt of this Court and to be dealt with accordingly.

Dated: January 23, 1945.

PEIRSON M. HALL,
United States District Judge.

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Doris Dillon Carlton, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1737 U. S. Post Office and Courthouse, Los Angeles, California. That on the 24th day of January, A. D. 1945, affiant served the within Order in said action, by placing a true copy thereof in an envelope addressed to Morris Lavine, the attorney of record for said Respondent in the Ninth Circuit Court of Appeal and Flanagan, Wilson & Thomas, the attorneys of record for said Respondent in this Court, at the business addresses of said attorneys, as follows: Morris Lavine, Esquire, 620 Bartlett Building, Los Angeles, California, and Flanagan, Wilson & Thomas, Attention Philip L. Wilson, Jr., 453 South Spring Street, Los Angeles, California, and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States Mail at Los Angeles,

California, where is located the offices of the attorneys for the persons by and for whom said service was made. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

DORIS DILLON CARLTON.

Subscribed and sworn to before me this 24th day of January, 1945.

[Seal] G. M. CUTHBERTSON,
Notary Public.

[Endorsed]: Filed Jan. 24, 1945. [15]

[Title of District Court and Cause.]

ORDER

Upon reading and considering the verified "Affidavit for Order to Adjudge A. W. Young, Secretary-Treasurer of the Penfield Company of California, in Contempt," filed in the above entitled cause on January 24, 1945, and further upon consideration of the oral arguments this day made in open court on the order issued by this Court on January 24, 1945, directing A. W. Young, Secretary-Treasurer of the Penfield Company, to show cause why a further order should not be made directing him to show cause why an order should not

be made holding him in contempt of this Court, and good cause appearing therefor;

It Is Ordered that A. W. Young, Secretary-Treasurer of the Penfield Company, appear before the undersigned Judge of the above entitled court in the United States Courthouse in the City of Los Angeles, California, on the 26th day of February, 1945, at 10:00 o'clock a.m. of that day, or as soon thereafter as the matter may be heard, and show cause, if any there be, why an order should not be made holding said A. W. Young, Secretary-Treasurer of the Penfield Company, in contempt of this Court, and to be dealt with accordingly. [16]

It Is Further Ordered that this order and all supporting affidavits shall be served upon the said A. W. Young, Secretary-Treasurer of the Penfield Company of California, by the United States Marshal or one of his deputies.

Dated: February 8, 1945.

PEIRSON M. HALL,
United States District Judge.

Approved as to form.

MORRIS LAVINE,

By FULTON B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Feb. 8, 1945. [17]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 2nd day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

This cause coming on for hearing on Order to Show Cause why A. W. Young, Secretary-Treasurer of the Penfield Company of California, should not be held in contempt of Court and dealt with accordingly, pursuant to order filed February 8, 1945; G. Morgan Cuthbertson, Esq., appearing as counsel for the plaintiff; Morris Lavine, Esq., appearing as counsel for the defendant:

Each of the said counsel makes a statement. Defendant Young is now found guilty of contempt of the Order to Produce Books and Records of the defendant company and it is the judgment of the Court that Defendant Young pay a fine of $50 and stand committed until paid, following which, on motion of Attorney Lavine, the defendant is allowed until 10 A.M., July 3, 1945, to pay the said fine. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, the applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this Court, entered July 2, 1945, which fined A. W. Young, secretary-treasurer of the respondent, $50 for contempt and ordered him to stand committed until the fine was paid.

Dated: September 24, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator.

G. MORGAN CUTHBERTSON,
Attorneys for Securities and Exchange Commission.

[Endorsed]: Filed Sept. 26, 1945. [19]

[Title of District Court and Cause.]

STATEMENT OF POINTS

This proceeding is one for civil contempt against A. W. Young, secretary-treasurer of the respondent, for disobedience of the order of this Court dated June 1, 1943, affirmed by the Circuit Court of Appeals, directing Young to produce specified

books and records of the respondent for examination by the appellant, pursuant to Section 22(b) of the Securities Act of 1933 (15 U.S.C. §77v(b)).

In its appeal, the appellant intends to rely upon the point that the District Court, having adjudged Young to be in contempt, erred in ordering Young to pay a fine of $50 and stand committed until the fine was paid, instead of imposing a remedial penalty, calculated to coerce Young to produce or allow inspection of the books and records of the respondent pursuant to the said order of June 1, 1943.

Dated: October 2, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator. [20]

G. M. CUTHBERTSON,
Attorneys for Securities and Exchange Commission. [21]

Received copy of within "Statement of Points" this 3 day of October, 1945.

MORRIS LAVINE.

By M. B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 4, 1945. [22]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The Securities and Exchange Commission, appellant herein, designates as the record on appeal the following portions of the record, proceedings and evidence in the civil contempt proceeding against A. W. Young, secretary-treasurer of the respondent:

1. Affidavit of Charles R. Burr of the Securities and Exchange Commission, filed January 24, 1945, in support of rule to show cause why A. W. Young, secretary-treasurer, Penfield Company of California, should not be adjudged in contempt, together with exhibits thereto as follows:

Exhibit A—Supplemental order of the Securities and Exchange Commission, dated January 16, 1945, directing investigation and designating officers to take testimony.

Exhibit B—Letter of Charles R. Burr to A. W. Young, dated January 16, 1945, and Order of Judge Peirson M. Hall, dated June 1, 1943.

2. Order of Judge Peirson M. Hall, dated January 23, 1945.

3. Transcript of proceedings before Judge Peirson M. Hall on February 8, 1945.

4. Order of Judge Peirson M. Hall, dated February 8, 1945. [23]

5. Transcript of proceedings before Judge Peirson M. Hall on July 2, 1945.

6. Judgment and order, entered July 2, 1945.

7. Notice of appeal filed September 26, 1945.

8. Statement of points.

9. This designation.

Dated: October 2, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator.

G. M. CUTHBERTSON,
Attorneys for Securities and Exchange Commission. [24]

Received copy of within "Designation of Contents of Record on Appeal" this 3 day of October, 1945.

MORRIS LAVINE.

By M. B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 4, 1945. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25, inclusive, contain full, true and correct copies of Affidavit In Support of Rule to Show Cause Why A. W. Young, Secretary-Treasurer, Penfield Company of California, Should Not Be Adjudged in Contempt with exhibits thereto; Order dated January 23, 1945; Order dated February 8, 1945; Minute Order Entered July 8, 1945; Notice of Appeal; Statement of Points and Designation of Record on Appeal which, together with copy of Reporter's Transcripts dated February 8, 1945, and July 2, 1945, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 1st day of November, 1945.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

In the District Court of the United States in and for the Southern District of California, Central Division

Before the Honorable Peirson M. Hall.

No. 2863-PH—Civil

SECURITIES & EXCHANGE COMMISSION,
Plaintiff,

vs.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG, Secretary-Treasurer,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
February 8, 1945

Appearances:

For the Plaintiff: J. Leonard Townsend, Assistant Solicitor, Securities and Exchange Commission; and Charles H. Carr, United States Attorney; by Homer H. Bell, Assistant United States Attorney.

For the Defendants: Morris Lavine, 619 Bartlett Bldg., Los Angeles, California, and William J. Clark, 619 South Olive Street, Los Angeles, California. [1*]

*Page numbering appearing at top of page of original Reporter's Transcript.

Los Angeles, California,

Thursday, February 8, 1945, 10 A. M.

The Court: Very well. Call the calendar.

The Clerk: 2863. Securities and Exchange Commission vs. Penfield Company of California. Hearing on order to show cause why A. W. Young, Secretary-Treasurer of the Penfield Company, should not be held in contempt of court and dealt with accordingly.

The Court: Let me see the files.

(Court examines file.) Ready in that matter?

Mr. Lavine: Yes, your Honor.

The Court: All right. And the other matter?

The Clerk: 17230. United States of America vs. the Penfield Company of California, and others. Hearings on the motion of defendant Alfred W. Young to quash subpoena duces tecum.

The Court: Ready in that matter?

Mr. Bell: Yes.

(The court at this time heard Case No. 17230, United States vs. The Penfield Company of California.)

The Court: Very well. The other matter on the calendar is the same matter under a different title.

Mr. Townsend: Do I understand, your Honor, Mr. Lavine has already expressed the position of the defendants?

The Court: I understood that he had not.

Mr. Townsend: Well, then, your Honor,—— [2]

The Court: At the conclusion of his remarks a

few moments ago he said that he had not. I understood him to indicate that he desired to have something further to say.

Mr. Townsend: I see.

The Court: Inasmuch as you are the moving party, I think it is your first shot at it.

Mr. Townsend: I think under these circumstances, your Honor, my statement is just to call your Honor's attention to the affidavit and the rule you issued——

The Court: Very well.

Mr. Townsend: And there being no other evidence in the matter, unless some showing as to why the rule should not issue.

Mr. Lavine: I will answer that, your Honor, that on examination it appears, as your Honor will see, there was no personal service of the rule, or of change of date, and all they did was to mail out copies of this to various parties, and some order of this last proceeding they had commenced, and under Rule 54 of the Rules of Civil Procedure for the District Courts of the United States process must be served by the United States Marshal, or his deputy, or by some person especially appointed by the court for that purpose, except a subpoena may be served as in Rule 45.

Now, of course, this is a subpoena duces tecum and I think all parties were entitled to a subpoena.

The Court: Is this a subpoena duces tecum? [3]

Mr. Lavine: No, this is a rule to show cause. No, this is not a subpoena duces tecum; originally

it was, and then it has gotten now into an order to show cause. I will submit the matter.

Mr. Townsend: I understand, do I, that is the full showing that counsel is making in response to the rule this morning?

Mr. Lavine: Yes, that is the complete issue. There is the proceeding here at this time to require us to show cause why we should not be cited for contempt; that, and the fact that the same proceeding was had by the Grand Jury requiring some documents, and it was for the purpose of an investigation, and since that time there has been returned a new indictment, all of this before your Honor, and which your Honor can take judicial notice of.

The Court: Rule 54? In other words, you maintain this is a process?

Mr. Lavine: Yes.

The Court: That the order is a process?

Mr. Lavine: Yes, this last order is a process.

The Court: That is the order of this court dated June 1, 1943?

Mr. Lavine: No, that is not a process, your Honor. I do not maintain that.

The Court: That is the order which directed the Penfield Company to produce its books and records and make [4] them available.

Mr. Lavine: That is right, as of a certain date, your Honor.

The Court: From which an appeal was taken?

Mr. Lavine: From which an appeal was taken.

The Court: Now, let me see.

Mr. Lavine: And then your Honor stayed the order pending the appeal. Your Honor granted the stay and bond was put up and there was a stay granted. That was on entire appeal. Now, they come back here and certainly that order cannot be complied with as of that date and of that time.

The Court: Then there is the change in adjournment thereof as determined by said officer or employee of the Securities and Exchange Commission. Now, I stayed the order, and I stayed it pending the determination on appeal.

Mr. Lavine: The mandate on appeal was filed December 7, 1944. The affidavit in support of the rule to show cause shows that on January 16, 1945, the order of investigation of the Commission was further amended by the designation of Mr. Burr, the affiant. Does it show who designated him in this?

Mr. Townsend: Designated whom, and for what, your Honor?

The Court: For disclosure of the information desired.

Mr. Townsend: And you will find attached to the affidavit, your Honor, a letter over Mr. Burr's signature addressed to the company, specifically to Mr. Young, in [5] which Mr. Burr informed the company that he would present himself at the office of the company——

The Court: On January 24, 1945.

Mr. Townsend: That is right. Yes, your Honor. And access to the books was refused.

The Court: Let me see, Mr. Lavine, let me fol-

low you further. Your contention is not, therefore, that the affidavit of June 1, 1945, nor the letter making the continuance, is a process? Your contention is not that they are a process?

Mr. Lavine: No.

The Court: You do not contend they are a process?

Mr. Lavine: No.

The Court: Now, what do you contend is the process which was required to be served by the marshal, the order to show cause?

Mr. Lavine: Yes, the order to show cause and the order of Mr. Burr, or some officer of the Commission, which he merely stated by means of a letter.

The Court: Which order of Mr. Burr? The letter just referred to?

Mr. Lavine: Of January 16, 1945.

The Court: I do not believe that that could be considered a process. There was the order of June 1, 1943, fixing the date of the 8th of June, 1943, and any adjournment thereof as determined by said officer or employee to [6] produce the full books and papers and records. As I indicated, I stayed that order pending appeal, and until after the mandate was signed this order could not be effective; after the mandate was signed, of course, June 8, 1943, had long since expired, and under the terms of this there would have to be another date either fixed by virtue of an adjournment, so-called, or a fixed inquiry, because otherwise the order of the court could be completely thwarted by merely taking an appeal. That day went by. Consequently, this

date of this letter of January 16, 1945, it seems to me could not, under any circumstances be held to be a process. It is merely a notice of the date of the adjournment of the original day of June 8, 1943. So I will hold against you on that point.

Now, what is your other point as to what is process? That the order to show cause here is process?

Mr. Lavine: Yes, your Honor. This is a proceeding in contempt, your Honor.

The Court: This is not yet a proceeding in contempt.

Mr. Lavine: No, just for an order to show cause.

The Court: I suggest to Mr. Townsend that in matters such as these, I consider it better practice, in civil matters, to make a motion for a rule to show cause why an order to show cause for contempt should not be granted. If you will observe, the order as originally presented was changed so that, in fact, now it is nothing more than a [7] motion for a rule to show cause. As this order reads, he appeared before the court on this date, which was the 5th, and it was continued to the 8th, to show cause, if any there be, why a further order should not be made on A. W. Young holding the said Young in contempt of this court. Nowhere is it stated it is in the nature of a motion for a rule to show cause, which, in my opinion, is the better practice, so I do not and I cannot hold with you that this is a process. If the order to show cause for contempt issues as a result of this motion, that, in my judgment, would be a process

and would be required to be served by the marshal, as it would be the institution of criminal proceeding.

Mr. Lavine: That is my misunderstanding of the nature of the proceeding, as I saw the original papers and did not see what I thought was the original order, or original motion.

The Court: All right. And now, if I hold against you on that point, what other point have you to make?

Mr. Lavine: I have this to say, your Honor, in respect to that matter. The case of Walling vs. United States, which was decided by this Circuit, holds an investigation by the Securities and Exchange Commission is similar in effect and purpose to that of a grand jury investigation. The Securities and Exchange Commission commenced this investigation and then apparently turned the matter over to the United States District Attorney. I think, for the purpose [8] of securing the identical documents, papers, and so forth, which the records before your Honor show were sought by the Grand Jury. Now, they have had the return of the indictment based upon the showing which was made before the Grand Jury and in which it was claimed these papers and documents were sought to be had. And then, before the Circuit Court the appellant, in opposition, requested for time to petition for a writ of certiorari, and the Securities and Exchange Commission set forth it was for the purpose of having an indictment returned, as I recall it, or for the purpose of concluding their investigation be-

fore October 5, 1944, that the particular books, papers, records or documents were sought. They are the ones that have been sought, the identical ones, that have been sought, in all of these proceedings. They are general, and include all the records, books, and papers, and there can be no purpose now in the Securities and Exchange Commission seeking them, other than to secure evidence for the trial in the identical case in which they were sought. And I submit under those circumstances that they should not be permitted now to conduct an investigation that has been concluded by the return of the indictment, under which all of these defendants are now under indictment. That is all, your Honor, I have to say.

Mr. Townsend: May it please the court, because this is perhaps the only chance I will have—— [9]

The Court: You have been admitted specially to appear in this case, or are you a member of the Bar here?

Mr. Townsend: I am not a member of the Bar here, and I have never appeared or had any motion to be admitted in any District Court here before, but if your Honor wishes that——

The Court: Well, I think perhaps to avoid any possible question in that connection, I will entertain a motion, Mr. Bell.

Mr. Lavine: I will raise no objections, your Honor.

The Court: I think the record had better be straight.

Mr. Bell: Your Honor, I move the admission of

Mr. Leonard Townsend for the special purpose of handling this matter which is now pending before your Honor.

The Court: Mr. Townsend is a member of the Bar of what state?

Mr. Townsend: The District of Columbia, your Honor, Maryland, and a member of the Bar of the Supreme Court.

The Court: Very well, Mr. Townsend is admitted specially for the purposes of this case, or this order, or this hearing.

Mr. Townsend: I think this hearing.

The Court: This hearing.

Mr. Townsend: Yes.

The Court: All right. You may proceed.

Mr. Townsend: Inasmuch as this is probably the only [10] time I shall be before your Honor on this matter regardless of the outcome of the present proceedings, and as it was intended that I should have been associated in this matter until completion, I felt that perhaps a more extended set of remarks might be in order, and I ask your indulgence for that purpose.

I am particularly impelled to do so by virtue of two things your Honor has said this morning, the first of which is that the proceeding that the Securities and Exchange Commission has instituted here looks towards a criminal proceeding.

The Court: I don't know that I said that, but if I did it is obvious that it does.

Mr. Townsend: I am going to address myself to that in particular, may it please your Honor.

The Court: All right.

Mr. Townsend: The second proposition your Honor just enunciated was, that a rule to show cause in a proceeding that we are appearing in would be in the nature of a process and required to be served. I shall respectfully attempt to dissuade your Honor from both those points of view, and I think that can be done very shortly.

Let it be said at the outset that what we are after here is the enforcement of your Honor's order entered almost two years ago and still unobeyed, notwithstanding the fact, your Honor, that it has been successfully affirmed [11] at every step and every level of the federal judiciary. That case was very clear, may it please the court, that in a proceeding brought to enforce a court's order where the object sought is to compel compliance, there would be no question at all but that the proceeding to that end is purely remedial and, therefore, civil in nature.

There are three cases that have arisen in this jurisdiction which are leading cases all over the country on that subject, your Honor. They are the case of McCrone vs. United States; still another, Clarke vs. Federal Trade Commission; and a recent case, Fenton vs. Walling; all of which I am sure your Honor has read.

The Court: I don't remember them. Don't take anything for granted when you are arguing with me.

Mr. Townsend: I am proposing to go into it completely.

The Court: All right.

Mr. Townsend: In the McCrone case, which was affirmed by the Supreme Court——

The Court: What is the citation of the McCrone case?

Mr. Townsend: That is 307 U.S., at page 61; and it is in the Ninth Circuit Court of Appeals at 100 Fed. (2d), page 322. Now, in that case, your Honor,——

The Court: Let's get them in here. The bailiff will bring them in.

Mr. Townsend: All right. There are lots of them on this subject. [12]

The Court: The second one that you mentioned is?

Mr. Townsend: Clarke vs. Federal Trade Commission.

The Court: Clarke?

Mr. Townsend: Clarke. 128 Fed. (2) at 542.

The Court: And the third one?

Mr. Townsend: Fenton vs. Walling. Just a moment, your Honor. That is in 139 Fed. (2d) at 608. Certiorari was denied in 321 U.S.

The Court: Will you get me 307 U.S., 128 Fed. (2d) and 139 Fed. (2d)?

Mr. Townsend: In this case, your Honor, the Circuit Court of Appeals in this Circuit, and the Supreme Court of the United States said, in substance, this: There should be no difficulty in distinguishing between so-called civil and so-called criminal contempts. And the test is a simple one. If what is sought in the one instance is for the bene-

fit of one of the parties to the action, and is for that purpose alone, it is a civil contempt; if there be any such purpose, or if it partake of that purpose, and yet be for the purpose of presenting contumely before the courts, and is particularly in the public interest to see that that should not happen, then it is a criminal case and instituted through criminal proceedings.

The Court: The Securities and Exchange Commission does not operate for itself, does it? I mean it operates in the public interest, doesn't it? [13]

Mr. Townsend: It does, indeed, your Honor. Now, in this case we are most emphatically urging upon your Honor that our purpose in being here is to enforce your order and nothing else. In this type of case, the proceedings, as the courts have said time and time again, result in a commitment of a party, and that party carries with him into the jail house the keys to that jail, meaning thereby that when he chooses to obey the court's order he can open the doors and walk out a free man.

The Court: If those are the terms of the order.

Mr. Townsend: Assuming that is the usual form in the case. We have here the usual form in each of the cases I am now about to speak of.

Now, let's consider the McCrone case, your Honor. There an Internal Revenue investigation was under way, a subpoena was directed to a person to appear to testify, but the person refused to testify; application was made to the District Court, and the District Court entered an order as your Honor did in this case, directing the person to

appear and testify. He continued to refuse. A rule to show cause was issued why he should not be adjudged in contempt. He was adjudged in contempt and committed until he should purge himself. The Circuit Court of Appeals for the Ninth Circuit affirmed; so did the Supreme Court. The Supreme Court said this, your Honor, among other things:

"While particular acts do not always lend [14] themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrant to offenses against the public."

Now, that quotation is one of the most familiar ones in the law on contempt, your Honor, because it is particularly a paraphrase, as some of them are, of the decision of the United States Supreme Court in the case of Gompers vs. Bucks Stove & Range Company, 221 U.S. 418, and I would like to read, your Honor, what the Supreme Court has said in discussing the matter in that case. It said this:

"* * * It is true that punishment by imprisonment may be remedial as well as punitive and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is in-

tended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases [15] is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

Now, in the Clarke case, your Honor, we have a different agency, the Federal Trade Commission, and the same pattern was before one of the judges of this district; as I remember it, Judge Harrison. There was a subpoena by the agency; a refusal to testify; an order of the court directing testimony; refusal to obey the order; a rule to show cause; a commitment for contempt; and a sustaining of the case in the Ninth Circuit Court of Appeals on the ground that the only question in the case is, has the order been obeyed.

The Fenton case is another subpoena case. It was a case in which the court exercised its powers under the discovery provisions of the new Rules of Civil Procedure; discovery was ordered; subpoena issued, and subpoena disobeyed; the court found after a rule to show cause that the complainant was entitled to an order of contempt until the disobeying person had complied with the order and had purged his conduct.

So let there be no mistake of what our position is, that this is a civil proceeding, a civil one, and if the time should arrive when this court orders its original order to be enforced by a committing order, it is still in nature, and never gets to the stage of a criminal proceeding in this particular instance.

Now, the second proposition I want to address myself to is the question of whether a rule to show cause for civil contempt is process and required by its terms to be served personally upon the defendant, and in connection therewith let me call your Honor's attention to the cases which have already decided that question.

In National Labor Relations Board vs. Hopwood Retinning Company, and that is to be found in 104 Fed. (2d), page 302, decided by the Second District Court of Appeals, the Second Circuit was called upon to enforce an order of enforcement which it had theretofore granted at the behest of the National Labor Relations Board. In the course of the proceedings holding the respondents in contempt, the Circuit Court of Appeals said this:

"As a proceeding for civil contempt, this is therefore properly a continuance of the earlier action in this court, and is a step in the enforcement of our previous judgment. Hence it was correctly instituted by motion served upon the counsel appearing for the parties in the record."

I can cite your Honor to another District Court case in the District of Columbia, which happens to be my bailiwick.

The Court: Well, that is reasonable authority.

Mr. Townsend: Thank you, your Honor, on behalf of the judges there. In that jurisdiction, your Honor, we have—— [17]

The Court: What is the citation?

Mr. Townsend: I will have to get it. It is right

here. Tilgham vs. Tilgham, contained in 47 Fed. Supp. at page 417.

The Court: 57?

Mr. Townsend: Fed. Supp., at 417.

The Court: That is the current one, is it?

Mr. Townsend: Yes, your Honor.

The Court: What kind of a case was it? It sounds like a divorce case.

Mr. Townsend: I was about to say to your Honor, that in our jurisdiction, in Washington, they exercise general jurisdiction over local matters. In this case the show cause order for contempt had been entered and it had been disobeyed. The rule in our jurisdiction is that in such cases service on non-residents may be had by publication and the order for a rule to show cause was served by a Deputy United States Marshal on the man in an entirely different jurisdiction. Judge Pine in that case held that such a proceeding was wholly remedial in aid of this order, held it was civil in nature and would not have to be served under the new rule of notice to counsel.

The Court: In any event, the rule is different in California.

Mr. Townsend: In the Federal Court?

The Court: In the California courts, in the State [18] courts.

Mr. Townsend: Now, I want to get back to the main track, so to speak.

The Court: Well, you can still have process in a civil action, can you not?

Mr. Townsend: I would suppose this, your Honor,——

The Court: Is the original summons a process?

Mr. Townsend: Yes, the original summons is a process. It must be served. There is no question about that.

The Court: Is there anything else in a civil action that is process?

Mr. Townsend: I don't know of anything your Honor.

The Court: Why should the rule say that service of all process shall be made by the Marshal or his Deputy except that a subpoena may be served as in Rule 45? Now, it indicates the subpoena is process, and it certainly is process if it is a requirement by the court.

Mr. Townsend: I don't read the rules in the same way. As a matter of fact, your Honor will remember when I presented the preliminary rule before you it was my position that, being a preliminary step of a rule to show cause as to why a rule to show cause should issue in a case was probably not, in our judgment, consonant with the new rules.

The Court: I understand.

Mr. Townsend: It is our position a simple motion [19] under the new rules to adjudge in contempt is the appropriate proceeding today, and could be set down even under the five-day rule, but we desired counsel to have adequate opportunity, and hence we followed the longer period and used the other proceeding. Now, getting to the merits of this thing, your Honor——

The Court: Pardon me. Let me ask you another question, at this point.

Mr. Townsend: Yes, your Honor.

The Court: Assuming the rule to show cause was issued and trial was had and the defendant was found in contempt, would the Court have any power to punish him, say, fine him and put him in jail for disobedience of the order?

Mr. Townsend: In a civil proceeding I think your Honor has the power to punish him, without doubt; you can punish him by fine or by imprisonment, and I have some cases I think your Honor will find interesting on the question that you have no discretion to deny it if the order issued or if the showing it made that the order has not been obeyed.

The Court: In other words, in the event I find the failure to comply, that the court is compelled arbitrarily to require him to comply?

Mr. Townsend: I think that is the substance of the opinions, your Honor.

There has been much attempt by Mr. Lavine, and I [20] think by Mr. Clark, to inject into these proceedings what may be called an argument touching the equities of the situation. I think it hardly falls with any grace from their lips to urge that upon this Court. Certainly there is no timely ground for failing to obey an order almost two years old, and certainly no legal one that I have heard any authority about. It would seem to indicate that a complete and apparently bland disregard of this Court's order. But, however that may be, I suppose the Supreme Court has many times, as your

Honor knows, said that the civil rights of citizens under the Constitution come first and so long as they may properly involve his civil rights it is better perhaps, that some person should escape the penalty of the law, than that the Constitution should be thwarted in its benevolent purpose. And so I say properly, and perhaps justifiably in my own mind, we have had the successive levels of this appeal, even though it has been pointed out, your Honor, that every one of the propositions that have been urged in the Appellate Court had been already decided, as was pointed out in the opinion and had been set at rest in previous actions of the Court. However, as I say, perhaps this presumption is to be indulged under the circumstances and may be they were seeking the right of review and not intending to delay a lawful investigation. But it seems to me, your Honor, that when once the parties have exhausted those rights that are guaranteed them under our [21] system of government and have, beyond that point, undertaken blandly to disobey your order, that then that clears everything that has preceded it, and it ought, by all the rules it seems to us, to call for the strong right arm of this Court, and to use, if I may so express it, the sword of Damocles to put an end to these pious judicial utterances. We didn't come into this court——

The Court: Which pious judicial utterances do you refer to?

Mr. Townsend: To the ones that there should be no order in this case enforcing your Honor's

order because this has happened, or that has happened, or there has been no rule, or there has been no service.

The Court: You mean the judicial remarks of this Court?

Mr. Townsend: No, your Honor. I mean the remarks of counsel. Your Honor, we did not come before you two years ago in a vain hope. We came in a judicial cause authorized under the law and we got an order from your Honor. It is still the order of this court, and I respectfully submit that your Honor should strictly enforce that order. There are principles and reasons here now which indicate if it is not enforced soon, may it please the Court, this whole purpose may be completely negatived.

Your Honor can see from the original petition which was filed before you nearly two years ago that the order of [22] the Securities & Exchange Commission, under which the enforcement of these proceedings was begun, was commenced in May of 1942. Now, the Statute of Limitations in the Securities Act of 1933 is three years.

The Court: In a criminal proceeding?

Mr. Townsend: Yes, your Honor, in a criminal proceeding.

The Court: And the purpose of the subpoena is, as I remarked, obviously for the purpose of getting information in relation to a possible criminal proceeding?

Mr. Townsend: Possibly, or possibly a civil proceedings, or an administrative proceeding.

The Court: Is there a three year statute on civil proceedings?

Mr. Townsend: There is no statute on that.

The Court: Any statute on administrative proceedings?

Mr. Townsend: No.

The Court: Then the urgency here lies only in connection with a possible criminal proceeding?

Mr. Townsend: That may very well be said to be just the situation, your Honor.

The Court: All right.

Mr. Townsend: As I say, the order of the Commisssion, under which these proceedings were instituted, began in May of 1942. We have a bare four months in which to develop any facts that the Commission may desire in connection [23] with its regular proceeding, if the provisions of the Act are going to be accorded their full weight. But quite apart from that, your Honor,——

The Court: Let me ask in that connection the Securities & Exchange Commission does not ignore the fact that there is an indictment here, does it?

Mr. Townsend: I don't know what you mean when you say "ignore", your Honor.

The Court: You know what "ignore" means, don't you?

Mr. Townsend: Yes, sir, I do. I don't understand exactly. You see, we did not institute the Grand Jury proceedings.

The Court: Oh, I understand that. But I mean the Securities & Exchange Commission is a part

of the same government for which the United States Attorney acts.

Mr. Townsend: Yes, your Honor.

The Court: Yes. And there is an indictment?

Mr. Townsend: There is.

The Court: A criminal indictment.

Mr. Townsend: There is.

The Court: For violation of the Securities & Exchange Act.

Mr. Townsend: That is right, your Honor.

The Court: All right. Now, what I mean to say is this: the Securities & Exchange Commission is seeking further [24] information or further evidence concerning a possible violation, knowing and generally ignoring that you do have an indictment?

Mr. Townsend: We certainly did know we have an indictment, your Honor;

The Court: In other words, you feel there may be other and further violations by the same defendants?

Mr. Townsend: Yes, that is the purpose of this investigation, your Honor. And possibly other defendants.

The Court: I see.

Mr. Townsend: In other words, we felt at the time that the matter was referred to the Attorney General under our statutory provisions that the investigation as to the matters that we then had evidence concerning could not wait, so that all the evidence we then had we took to the Attorney General.

validating Claims 3 and 4, the defendants in the first case ceased to consider themselves bound by the terms of the consent injunction; whereupon the plaintiff brought a proceeding in contempt of his original case and the lower court having called to its attention the opinion invalidating Claims 3 and 4, refused to commit and an appeal was taken by the plaintiff in the first case. The Second Circuit Court of [27] Appeals, after holding that the consent decree was an estoppel, used this important language:

"While the decree stands they,"—that is, the defendants—"must obey it, and the plaintiff is entitled to the usual sanctions for its enforcement."

An order of contempt was issued and in the second case damages were awarded the plaintiff for civil contempt to the fullest extent that he would have been entitled to such damages had there been no second suit invalidating these Claims, and such order was affirmed on appeal.

I cite your Honor Judge Woolsey's opinion in the District Court for the Southern District of New York, in a comparable case, entitled "In Re Sylvester" to be found in 41 Fed. (2d), at page 235.

The Court: 245?

Mr. Townsend: 235, 41 Fed. (2d). This language was used, and following it Judge Woolsey cited the Ingraham case as his authority.

"In a civil contempt punishment is not discretionary because the object is remedial, and the party invoking the court's aid on the contempt has the right to its remedy."

Your Honor, there has been no showing in this case, none at all, on any factual situation, which goes to the question of why the respondent here has not complied with [28] your order. There is not in this record one scintilla of evidence by affidavit or any other form from the mouth of Mr. Young, and he may be here, in answer to your rule, why he has not complied with your Honor's order. There is an affidavit in the record, your Honor, that we have asked him to comply with your order, either the Company or Mr. Young, and they have not done so.

Now, under these circumstances, your Honor, we certainly submit that the strongest possible case should be made out in our favor. But what is urged upon your Honor? It is urged that there has been an indictment. That raises a question that to me, and I think to the courts, and I hope ultimately to your Honor, will be absolutely irrelevant to the question before you, and let me try to convince you that is so. In the case of Oriel vs. Russell in the Supreme Court of the United States, your Honor, the proposition was laid down, as to a civil contempt for failure to obey an order of the court, that on the contempt proceeding itself the Court is limited to the reception of only such evidence as goes to the question of the ability or inability of the person who has been commanded by an order to do what the order said. Let me read you the very intelligent language of the Supreme Court on that question.

The Court: Well, that is generally the law, the

event that they might have ability or inability to obey. Of course, that is a very broad term. I have heard hundreds [29] of contempt matters in alimony cases, and that is the general rule. In a few words I would say it is ability or inability. Now, ability or inability might involve a lot of things; it might involve any number of things. It might be a legal inability. In fact, it might be so many things, particularly, things that affect people's lives. But generally that is the rule, the ability or inability to comply with the order.

Mr. Townsend: I want to make sure——

The Court: If there is an intervening right, well, then I think the Court can take that into consideration, too.

Mr. Townsend: Intervening right of what?

The Court: Some order or judgment, or something which affects the situation, which intervenes and affects the rights of the parties. I think the Court can take that into consideration.

Mr. Townsend: I am sorry to say I fail to follow it. It is probably because I am——

The Court: You go ahead with your argument. It is immaterial anyhow.

Mr. Townsend: I am arguing the proposition that the only thing that this court should take into consideration this morning, in answer to this rule, is whether the defendant Young has the books in his possession. I say to your Honor—— [30]

The Court: Not this morning, because when the contempt comes up that will be the time to consider that, if the rule is issued.

Mr. Townsend: All right, your Honor. Yes, when he is called before you for contempt. [31]

The Court: Yes.

Mr. Townsend: I think it is important, your Honor, and I stress and emphasize the point I am trying so hard to make, as to this business about an indictment or any intervening happening, that that has just as much weight, in accordance with the Supreme Court decision which I am about to read from, as if the defendant just said, "I do not want to comply with the order." Now, I may be wrong; but I don't think so.

The Court: That might be true as to corporate books. I would seriously doubt that being true as to any individual's books and papers.

Mr. Townsend: I make that statement recognizing the distinction your Honor is making, yes. This was a turnover of certain books in bankruptcy and the question was has one the right to be supported by clear and convincing evidence, and then the court says, when the lower court decided that the order should be entered it should have before it the kind of clear and convincing evidence that it speaks of, and then it goes on:

"The Referee and the Court in passing on the issue under such a turnover motion should therefore require clear evidence of the justice of such an order before it is made. Being made, it should be given weight in future proceedings as one that may not be collaterally attacked by an effort [32] to try over the issue already heard and decided at the turnover. Thereafter on the motion for com-

mitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order."

The Court: Did Judge Taft write that decision, Mr. Townsend?

Mr. Townsend: Yes, he did, your Honor, yes.

The Court: And doesn't he say along towards the end there that the contempt proceeding there is in the nature of a criminal contempt?

Mr. Townsend: If he does, I don't know how he could possibly say it when he just got through saying the order was coercive in nature, but let us find out. It says:

"A turnover order must be regarded as a real and serious step in the bankruptcy proceedings and should be promptly followed by commitment unless the bankrupt can show a change of situation after the turnover order relieving him from compliance."

He says:

"The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issues presented on the [33] motion to turn over as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in countless delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one."

Then here Justice Taft quotes from the Gompers case, which holds it is a civil case, your Honor.

The Court: It is immaterial. My inquiry there was not of any meaning. I remember the case in connection with bankruptcy turnover orders.

Mr. Townsend: Let us suppose we didn't have the case. Let us say we get right down to the question of what Mr. Lavine has presented here as his only argument as to why the rule should not issue. What was it he said? That there was an indictment since the order was entered. Now, I am going to cite your Honor cases right on that very proposition and the first one is one involving the Securities and Exchange Act of 1933, raised in the Circuit Court of Appeals.

The Court: Go ahead.

Mr. Townsend: Your Honor, I should like to cite you the case of In re Verser-Clay Company, in 98 Fed. (2d) page 859.

The Court: That is in what book?

Mr. Townsend: 98 Fed. (2d), and certiorari in this [34] case was denied, may it please the court.

The Court: And what is the name?

Mr. Townsend: The title of the case is In re Verser-Clay Company.

The Court: On what point do you cite that?

Mr. Townsend: That is on the point that the intervention of an indictment——

The Court: All right.

Mr. Townsend: ——is no bar to enforcing your order. There is no need going into the fact because the opinion is very short and states the facts very concisely and they are as follows:

This is by Justice Lewis of the Circuit Court:

"Clay says he relies on the Fifth Article of Amendment to the United States Constitution, U.S.C.A. Const. Amend. 5:

"'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"He further says that he and Mr. Verser have been indicted in the United States Court for the District of Columbia for criminal offenses described in said Sections 5 and 17 of the Securities Act, and that the object of the Commission and its officers is to obtain from him proof of their guilt and use it against them in that prosecution or use it in finding other indictments, and that the [35] production of the books alone might disclose such incriminating facts and he believes they would. But Clay cannot claim the constitutional privilege for acts of the corporation."

Citing Wilson vs. United States, and citing several other cases; Wheeler vs. United States; Grant vs. United States; Brown vs. United States; Essgee Company vs. United States; all Supreme Court cases, as your Honor knows. (Continuing):

"It may be true that there is something in the corporate books and documents that shows personal acts of Clay that tend to incriminate him. If so, he had an opportunity to present them to the District Judge and ask that he be protected in his constitutional rights, but he sought no protection in that respect. It is not claimed that when he was on the witness stand any question was asked the answer to which would tend to incriminate him.

Clearly the privilege asserted by him does not extend to the two corporations."

Now, your Honor, if that does not dispose of the contention of Mr. Lavine then I am at a loss to know what possibly could, but just on the chance your Honor might wish to consult further the authorities——

The Court: I think the law is very clear about the books and records of a corporation. I think, however, there [36] is still a field of the law where it is just a little unsettled, according to the Supreme Court decisions, about the incrimination of an individual in connection with books and records of a corporation. I am just saying that now more or less from a philosophical viewpoint. I don't know that it is of particular application here, although it might be, because you seek to hold A. W. Young, an individual, in contempt. As indicated by the last remark, there seems to be some field where an individual is entitled to protection. For instance, the Court there says, if he needed protection he should have applied to the District Court for protection.

Mr. Townsend: I have no quarrel with the proposition, your Honor.

The Court: Just how far or just where that goes, I don't know. I was unable to decide as a prosecutor when the question was presented from time to time, and I am still at a little bit of a loss as a Judge as to just where that field begins and ends, but I believe it does exist.

Mr. Townsend: Your Honor, with all due deference, I certainly submit the question, and I think in connection with the matter of compelling an officer of a corporation to produce books of a corporation in the event of a criminal indictment, or otherwise, that matter has been very completely covered.

The Court: Oh, I think that is true, but some place [37] along the line, as they indicate from time to time, and as the Supreme Court recently indicated in the case where they had some labor union officer up——

Mr. Townsend: That is one of the C.I.O. cases?

The Court: In any event, he had charge of the books and records of the corporation and refused to testify, and they held he had to turn over the books of the corporation, but they went on to indicate, not by exact language, but rather by their discussion, that some place along the line there might arise the question of this man's right not to incriminate himself.

Mr. Townsend: The question of whether or not he can be compelled to incriminate himself is not even involved in this proceeding, nor should it be, but assuming for the purposes of the present discussion that it is, certainly the area of that protection, whatever it may be, can extend no further than to his personal and private memoranda, papers and documents, and we do not want his personal, private papers, documents, or memoranda. And your Honor has not issued any such order in this case. On the contrary, we do want, your Honor,

what all the courts have said we are entitled to, the books of the corporation, which, under the law, must be supplied under a proper subpoena.

Now, your Honor, I do intend to draw even more on the authorities in support of the proposition that the intervention of the indictment in these proceedings can have no [38] force or effect upon the matters that are before you in this civil matter. Take the case of Sinclair vs. United States, back in the days when the Senate was investigating the Teapot Dome oil leases. Mr. Sinclair and his corporation were the subject of a grand jury inquiry. They were also the subject of civil suits instituted at the behest of the Attorney General to recover huge sums alleged to be due and owing to the government. While these things were happening, your Honor, the Senate, in investigating it, issued a subpoena to Mr. Sinclair compelling him to testify, or calling for him to testify. He appeared before the Committee and was sworn, and it was then urged upon the Committee that all that this proceeding was intended for was to enable the Government to get some evidence to help it in either or both of its proceedings, criminal and civil in nature. The Committee overruled this objection, asked the question and the witness refused to testify, whereupon he was proceeded against under the applicable statute, and his conviction of the offense was appealed. The Supreme Court, in negativing it adopted this rule, if the subpoena is issued in aid of a lawful authority, it cannot be negatived by other considerations; and, therefore, said the

Supreme Court, all we are interested in in this proceeding is, did the Committee and Congress have the authority to have that testimony. It is true, said the Supreme Court, Congress has no authority per se to conduct merely private [39] inquiries in aid of litigation or anything else, so if that was the authority that was asserted, it could not be sustained, but Congress did have the authority, said the Court, to look into the question of these oil situations, look into the obtaining and enactment of legislation in connection therewith, and then the Supreme Court said that the subpoena should have been complied with and that this intervention of different things had no application.

Probably it has happened even in this court, although I am not sure that it has, but it has happened in many district courts, and has been affirmed in many Circuit Courts of Appeal, where we have the analogy of the application of the bankrupt statute, where under one section of the law the trustees are enabled or authorized to proceed to collect funds for the benefit of the estate, and another law gives the trustees the right to subpoena witnesses and to conduct an interrogation into the affairs of the bankrupt. Those cases have uniformly held, your Honor, that the fact that a suit has intervened since the man has been called to give testimony as to those matters, does not change the fact that a suit has intervened since the man has been called to give testimony as to those matters, does not change the fact that the authoriy exists under the statute to compel the interrogation.

Let me cite you the language of the Circuit Court of Appeals of the Second Circuit, in In re Paramount Publix [40] Corporation. That is to be found in 82 Fed. (2d) at page 230, and the Court said:

"There is a controversy here, however, as to (a) whether the estate is still in the process of administration, and (b) whether the order was improper as granted for the sole purpose of enabling the trustees to prepare their pending suits for trial.

"The estate is still in the process of administration. The Court still retains control over an important asset of the estate, namely, the causes of action set up in the three suits. Section 77B(h) of the Bankruptcy Act (11 USCA, 207 (h)) provides: 'Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any * * * and causing the case.' See, also, section 2(8) of the act (11 USCA, 11(8)), giving the bankruptcy court jurisdiction to 'close estates, whenever it appears that they have been fully administered by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered.' These sections contemplate a distinction between the conclusion of the administration of the estate and a formal closing of the estate. There can be a time when the estate is [41] fully administered and yet not closed. Thus the statement in Skubinsky vs. Bodek," citing authorities—"985, 19 Ann. Cas. 1035, that a witness may

be summoned any time after the commencement of proceedings until the estate is closed by order of the court may go too far. However, as long as there is an asset, tangible or intangible, in the court's control, the estate may be considered to be in administration. In Bilafsky vs. Abraham, 183 Mass. 401, 67 N.E. 318, an estate was held not to be fully administered under the section last quoted above while the bankrupt had a cause of action not realized upon, and although the estate had been closed, proceedings were reopened to prosecute suit for the benefit of the estate. Stephan vs. Merchants' Collateral Corp., 256 N.Y. 418, 176 N.E. 824, similarly outlined the reopening of an estate as the proper procedure for prosecuting a claim of the bankrupt existant at the time of the closing. This Court, in re Schreiber, 23 F. (2d) 428, likewise allowed the reopening of an estate where the bankrupt at the time of closing had an asset consisting of a claim to tax refund. These cases allowing an estate to be reopened, proceeded on the ground that the estate was not fully administered while there was a valid cause of action [42] in favor of the bankrupt. A like situation prevails here. There are assets of the estate outstanding and in the court's control. Trustees are obligated to collect these assets under the direction of the court by Section 47a (2) of the Bankruptcy Act, as amended (11 U.S.C.A. 75(a) (2)), and until its duty is discharged and the assets collected are out of the court's hands, the estate is still in administration. In re J.A.M.A. Realty Corporation (CCA.) 79 F.

(2d) 546, holds nothing to the contrary. Anything supporting the appellant's position which can be taken from that case must be regarded as a dictum.

"The appellant's position, that the test of whether the estate is in the process of administration must be determined entirely by the status of the plan for distribution of the assets to the creditors, is not adaptable to 77B proceedings. This statute contemplates continuation of the business and payments by securities of the debtor. The payment of the proceeds of these suits to the debtor will benefit the corporation by strengthening its financial position and its security holders will be correspondingly helped.

"As to the second question, the appellant relies upon a quotation from In re Fixen & Company, [43] (D.C.S.D. Cal.) 96 F. 748, 755: 'The examinations thus provided for are not intended as a means of producing testimony pertinent to issues then on trial, but their object is to afford to the creditors, and the officer charged with administering the trust, full information touching the bankrupt's estate in order that necessary steps may be taken for its possession and preservation.' This rule may provide a workable distinction where the issues then on trial are not concerned with recovery of or realization upon the property of the bankrupt."

Citing other authorities, your Honor.

"But even the Fixen case says: 'The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience

of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim.' To allow an investigation to discover what property the bankrupt might have, and still to disallow an examination where the process of recovery on a claim has gotten under way, would be an absurd result." [44]

Take our situation, your Honor. We have started in to do a thorough job, if we can, in investigating a situation that has already, without the aid of our complete investigation, brought forth one indictment on a situation that the Commission has had before it on an open docket for nearly three years. The statute authorizes us to conduct that investigation. It is totally independent of and bears no relation to any other proceeding or any other remedy of this government.

Under the circumstances, your Honor, I strongly urge upon you an early decision in this matter in behalf of the Commission, otherwise the whole purport of the Securities Act, so far as these people are concerned, may be, to use the language of the Supreme Court, "frittered away." Thank you, your Honor.

Mr. Clark: If your Honor please, I shall detain you only for a moment. I confess lack of familiarity with the cases which counsel has cited, but as to the general law of contempt I think I should be regarded as able to speak with that positiveness which arises from the fact, which your Honor

takes judicial notice of, that I come in on contempt in more ways and more times than any other member of the Bar.

The Court: Well, I think several people are running you a close second lately. [45]

Mr. Clark: Now, my function here is to direct your Honor's attention to the factual situation with which I am possibly more familiar than Mr. Lavine, as long as Mr. Lavine was out of the city at the time the letter attached to the affidavit was written, and, consequently, that affidavit and the attached matter came to my attention rather than to Mr. Lavine's, and he has not had time to examine it carefully.

Now, I am going to lay down as a premise for the purposes of this motion a fact not alleged in the affidavit, or in the accompanying papers, and, therefore considered as one that does not exist. Having in mind that when I came into court the other day counsel challenged my good faith, I am going to say to your Honor, that while I was challenged as to my good faith, it is impossible for me to believe that the officers who presented this affidavit have exercised that great degree of candor which I would have expected those officers involved to exercise. They have attached a copy of the letter addressed to the Penfield Company of California, 1527 South Robertson Boulevard, but they state in their affidavit that he called at the office of the Penfield Company. But they do not state that they called at 1527 Robertson Boulevard, for the reason that they could not state so truthfully.

Thus, so far as the original letter is concerned, the presumption is that it was mailed to an address where it never reached the Penfield [46] Company at all. They state that they addressed a letter to Mr. Young at a certain place, but they do not state that that place is his residence. And I have no knowledge that it is. But if it was his residence, I assume they would have stated so. They state they addressed another letter to Mr. Lavine's office, but they failed to state the information which they received from that office, and which, if it was stated, would throw a flood of light upon their further statements that they called at the office of the company and were refused the papers. They are very careful to state they did not demand the papers, or not to state they demanded the papers of Mr. Young, while Mr. Young was there, or that Mr. Young refused them access to the papers. Everything that they have alleged in their affidavit is perfectly consistent with the fact that their letter to Mr. Young never reached him, and that Mr. Young had no knowledge that they were going to demand an inspection of the papers at the time they attached or they made their demand.

Now, I submit in all frankness and all candor if that evidence were before the court, and no further than that, on this preliminary showing, that this is sufficient to sustain the jurisdiction of the court to make a finding that this matter of contempt would not be before the court; and if an order to show cause is going to issue, I respectfully suggest that it should not issue until such [47]

facts as to make a prima facie showing that contempt has been committed by Mr. Young are presented. In other words, until they have shown by a prima facie case, that Mr. Young had knowledge of their intention to visit the office for the purpose of the inspection at the time that they say they made this, or that Mr. Young was there, or that a refusal was made with Mr. Young's knowledge and under his direction.

Mr. Lavine: May I add another remark to that, your Honor? I have listened to the very able argument of Mr. Townsend on the question generally applicable to various contempt proceedings and his attempt to distinguish those cases from this case as a civil procedure, rather than a criminal one, in its nature. I think your Honor has the right and duty to consider all of the proceedings had.

Now, we have here a very unusual set of facts. Now, before the Circuit Court of Appeals a Mr. A. Judy said:

"I am the Regional Administrator of the San Francisco Regional Office of the Securities & Exchange Commission; I am one of the attorneys of record appearing on behalf of the Securities & Exchange Commission in this matter and am fully acquainted with the facts therein set forth."

And then he refers to various matters that had preceded, and he says that the subpoena he is seeking to enforce [48] was issued in the course of an investigation by the appellee to determine whether the appellant in the course of the sale of securities had violated the registration provisions, Section

5 (a) of the Anti-Fraud Provisions, of Section 17 (a) of the Code, 15 U. S. Code, Section 77 (a) and 79 Q(a), and that such investigation may result in the institution of an injunctive action under Section 20 (b) of the Code of Criminal Prosecutions for wilfully violating Section 24, 15 U. S. Code, Section 77 (m).

Now, I think the court may note that thereafter the same ones were subpoenaed prior to the Grand Jury investigation, by the Grand Jury, that the original documents were sought, and that thereafter the Grand Jury returned an indictment.

Now, the function of the Securities & Exchange Commission, as set forth in the statute and the decisions regarding the Securities & Exchange Commissions, is that it performs a similar and distinct function to that of the Grand Jury, and when that object has been completed, its function has been exhausted.

It appears that the Securities & Exchange Commission prepared, apparently, all of the papers, and unless Mr. Townsend is unfamiliar with it, I think it is very evident that the subpoena is identical, and that the matters presented in the indictment are matters which were gathered by the Securities & Exchange Commission and presented to [49] the Grand Jury when that body was in session for the return of the indictment.

Now, the matter cannot be said to be civil where their object was to secure an indictment, and they have secured it and their function has been completed.

Your Honor can certainly take judicial notice of the fact that is the same subpoena, the same nature, the same request, the same thing, and in both instances how can they say they were seeking something different, or that they are seeking a different object than what the Grand Jury sought when it was presented to them? It is asking your Honor to close your eyes to the actual facts as they exist. We are submitting the matter.

The Court: As to the point which Mr. Clark made, whether or not there was a prima facie showing, are you prepared to discuss that?

Mr. Townsend: Well, your Honor, I think so.

The Court: The order was made directing A. W. Young, Secretary-Treasurer—you have the order before you?

Mr. Townsend: Yes, your Honor.

The Court: ——A. W. Young, to appear before the Securities & Exchange Commission, Room 1737, in the United States Post Office, to produce the following documents:

"It is further ordered in accordance with the stipulation and agreement of the parties made in open court that [50] the books, papers, and documents herein ordered to be produced, as aforesaid, in lieu of their physical production, as heretofore ordered, shall be made available to such officers and employees of the Securities & Exchange Commission as may be designated at the office of Respondent at 8900 Beverly Boulevard, Los Angeles, California."

Now, I don't think that the points which Mr.

Clark makes are minor ones. I mean, because of my experience with contempt matters, it is my opinion your matter in your prima facie showing must be accurate; if that were always the case, there would not be so many reversals in contempt cases by the Appellate Courts. The affidavit, I think, is in order with the order.

Mr. Townsend: Yes, your Honor.

The Court: Showing the change of dates, and the designation of the change of place, for instance. I don't think those are material. But in view of the stipulation of their failure to produce them in the Federal Building, at this office——

Mr. Townsend: Yes, your Honor.

The Court: ——but that they would be produced at this address, and there being no showing that this address is the address, or that there has been any change of address of the Penfield Company, and there being no showing that a demand was made on January 24, 1945, and that at that time and place—the place is not indicated—they [51] had ability to comply.

Mr. Townsend: They had the ability to comply.

The Court: There is no indication here that they had the ability to comply, and I think you laid down the rule that the only thing that the court could take into consideration was whether or not they had the ability to comply.

Mr. Townsend: That is their answer to the rule.

The Court: I think you must show that the demand was made at the time and place mentioned in the order.

Mr. Townsend: I certainly think the affidavit shows that, your Honor. We have alleged that.

The Court: That is possibly so.

Mr. Townsend: I am perfectly willing to take evidence on the question right now, your Honor.

The Court: I have not examined it with that point in mind. It did not occur to me until Mr. Clark suggested it.

Mr. Townsend: Your Honor, there is a short answer to that. They are here and appearing in opposition to the motion which certainly evidences that counsel received a copy. There is no need for government counsel, we submit, to show more than that counsel of record in this case had the notice of the rule that your Honor issued.

The Court: I think that is correct if it is here.

Mr. Townsend: Yes. [52]

The Court: I believe that you are correct. I think the points that Mr. Clark made would go to the question of the sufficiency of a showing upon a rule to show cause.

Mr. Townsend: Yes, your Honor.

The Court: But for this purpose I think this affidavit is sufficient.

Mr. Townsend: Yes.

The Court: The rule to show cause will issue. And if you will prepare a form and submit it to counsel under our rules for approval or objection as to form, you may do that. You will provide in it that the order must be served, however, by the marshal, because whether you are correct or whether you are not correct as to the law, and I am in-

clined to think you are incorrect, the rules provide, nevertheless, that the court may, in its discretion, order service to be made by the marshal or provide that the service of the order shall be made by the marshal. I will fix the return date. What day is this set for trial?

Mr. Lavine: We have stipulated it will go until April 10th, your Honor.

The Court: To begin?

Mr. Lavine: Yes, to begin.

The Court: Well, I will make the return date. I wish to make this observation, that whether you are correct, Mr. Townsend, or not, in connection with this procedure being entirely independent of the Grand Jury proceeding, the court [53] is bound to observe in taking judicial notice of this matter, that each one of the subpoenas seek the identical thing, and in view of the fact you have returned an indictment against the defendants, the urgency of the statute of limitations against them has now passed in the criminal matters; however, the Securities & Exchange Commission may have administrative matters upon which there is no statute of limitation, or civil matters upon which there is no statute of limitation, so it seems to me perhaps this matter might well be heard on the contempt after the conclusion of the criminal trial.

Mr. Townsend: Your Honor, it may very well develop that other defendants could be located in connection with the very criminal case that is now pending before your Honor, and a new indictment obtained which might supersede the old one.

The Court: I take cognizance of the provision in Rule 1 of the Rules of Civil Procedure, that the very first thing mentioned is that the rule shall be construed so that there shall be justice.

Mr. Townsend: And speedy.

The Court: And speedy, but justice first.

Mr. Townsend: Yes, your Honor.

The Court: And it seems to me that in view of the fact that you now have the indictment of these people, certainly the government does not want to accumulate [54] penalties on top of these defendants. I mean a whole series of them. I feel that justice would be served if the hearing on this matter were postponed until after the trial of the criminal matter. I would have to hear both of them and I believe it would be fair to them and better for the public interest if this matter were heard after that date. I will, however, make the return date on your rule before that date. But I feel as though I should, in having this intention to make it before that date, make this announcement which I have just stated concerning my views.

Mr. Townsend: In other words, your Honor, you will have to determine that, however, regardless of the showing made on the rule today. [55]

The Court: Yes.

Mr. Townsend: Your determination or decision on the matter will be postponed?

The Court: That is presently my opinion. I will make the return day before then so as to give both government and the defendant an opportunity to say whatever they desire.

Mr. Townsend: Yes, I see, your Honor. Thank you.

The Court: And it may be, at that time, facts might occur which, in my judgment, would require, in the interest of justice, an earlier hearing on the contempt matter.

Mr. Townsend: Under those circumstances, may I request your Honor to fix the time within which we might file with your Honor, prior to the return day, anything in the nature of affidavits or observations that may seem appropriate?

The Court: I think that whatever affidavits you expect to rely upon should be made and served with the return.

Mr. Townsend: Today?

The Court: Oh, no. Today I am simply making an oral order.

Mr. Townsend: I see.

The Court: That the rule shall issue.

Mr. Townsend: Yes.

The Court: You may prepare a form and support it with whatever affidavits you desire, and provide in the order that it and the affidavits shall be served by the marshal. The return day I will now fix. [56]

Mr. Townsend: Yes, your Honor.

The Court: With the idea that my present opinion is, that you return at that time, and I will not that day try the rule, but give consideration to whether or not it should be tried before or after the criminal case. Is that clear?

Mr. Townsend: Yes.

Mr. Bell: In view of the fact that you have mentioned the criminal matter, I would like to say just one thing, namely, that, as I indicated during my own discussion, the investigation of the Grand Jury up to that time indicated there were quite a number of other defendants as to whom proof or evidence was inconclusive, showing that in their minds they needed additional evidence. Now, that evidence, one way or the other, whether it would or would not incriminate them, may be found in the books of the Penfield Company of California.

The Court: It may, no doubt, develop in the trial, because I cannot overlook the fact you are going to have a trial and a great many things may develop which will clarify the whole situation, no doubt.

Mr. Bell: There is one point I wanted to make. The statute of limitations is more or less clipping at the heels of this very case, and those other persons are not yet indicted. Consequently, it may be too late after the return date on this other matter.

The Court: Well, we will expedite the trial, if you [57] have to have witness on the trial, and we will set it down beforehand so that the matter can be disposed of. What would be a convenient date for the return date of this rule? This is February 8th. March 5th? Is that ample time?

Mr. Townsend: Yes, your Honor. The 5th will be fine.

The Court: We will fix the date as March 5th for the return of the rule, at 10:00 o'clock.

Mr. Lavine: That is very satisfactory to me at this time, but I have this one observation to make.

The Circuit Court of Appeals will be here on March 5th and they have set five cases that I have pending up there, and if I could have another time, it might be better.

Mr. Townsend: Earlier, your Honor, would be agreeable to us.

The Court: Well, February 26th. That is a week before that.

Mr. Townsend: Yes, your Honor.

The Court: It is a matter of giving the government time to prepare their affidavits.

Mr. Townsend: The 26th? That is fine.

The Court: I think I would prefer to set it for the 26th and at that time we will determine whether or not we will proceed to hear the rule or postpone it until after the trial of the criminal case.

Mr. Townsend: Yes, your Honor.

The Court: If you wish to file points and authorities, [58] I suggest you file them with your return on the rule.

Mr. Townsend: With the return on the rule?

The Court: Yes, if you desire. I would like them sufficiently in advance.

Mr. Townsend: I will get them to you just as quickly as I can have them typed.

The Court: If Mr. Lavine desires to file contradictory authorities, he may.

Mr. Lavine: I will have some time in February to file them, but in March I will not.

The Court: All right.

[Endorsed]: Filed Oct. 4, 1945. [59]

Los Angeles, California,

Monday, July 2, 1945, 10:00 a. m.

(Other Court matters.)

The Court: Call the Civil calendar.

The Clerk: No. 2863, Civil, Securities and Exchange Commission v. Penfield Company of California.

Mr. Lavine: Ready, your Honor.

In that matter, we have two affidavits which I have served on counsel and which we wish to file.

The affidavits, in substance, show that Mr. Young was not in the city at the time the notice was sent, nor at the date required or asked for him to appear, which was January 24, 1945. He was out of the city and out of the state. Further, that his counsel was also out of the city and out of the state at that time. His counsel was then in Washington in the East.

Mr. Cuthbertson: This matter has been pending before this Court for over two years. I wonder if the Court would be helped if I made an outline of the chronology of the dates?

Mr. Lavine: I think we tried this case a short time ago.

Mr. Cuthbertson: This is something entirely different from a criminal case.

Mr. Lavine: The Court tried the civil matter too.

The Court: Does this arise out of the civil pro-

ceeding which was in this Court and went to the Circuit Court: [2*]

Mr. Lavine: Yes, your Honor.

The Court: This is the same order involving originally there?

Mr. Lavine: That is correct, your Honor.

The Court: This then is a trial on the merits of the contempt?

Mr. Cuthbertson: This is the order to show cause for the contempt, yes.

The Court: You are ready to proceed?

Mr. Cuthbertson: We are.

The Court: Are you ready?

Mr. Lavine: Yes, we are ready.

The Court: I will mark it ready.

The Court: We will proceed with the Penfield matter right now. Are you ready?

Mr. Lavine: Yes, your Honor.

Mr. Cuthbertson: I think in a contempt proceeding of this nature the burden of proof is upon the plaintiff or moivng party as far as the facts are concerned. I think that burden of proof was met with the affidavit which was filed in this Court on January 24th of this year.

This matter has been pending for over two years. On May 14, 1942 the Securities and Exchange Commission issued an order directing an investigation to be made. [3]

The Court: Just a moment. I want to find your affidavit and order to show cause for a contempt proceeding.

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*Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Cuthbertson: That was filed on January 24th of this year. It sets forth the facts which I was about to outline to the Court. I thought I would save the Court the trouble of reading it.

The Court: Go ahead.

Mr. Cuthbertson: On May 14, 1942 the Commission issued this order directing its Los Angeles office and other offices to commence an investigation of certain matters, certain activities of the Penfield Company which the Commission was convinced constituted violations of the Securities Act of 1933.

An order was made appointing Charles R. Burr, among others, as officers with certain powers. The powers which were given by statutes and by law to these officers is set forth rather broadly and I would like to read it to the Court, Section 19 (b) of the Securities Act of 1933.

The Court: I think their powers are all right. I held that it was originally, and that was later affirmed by the Circuit Court.

Mr. Cuthbertson: Acting under that order and with those powers, the Commission issued a subpoena dated April 19, 1943 directing the Penfield Company to produce certain books and records of that corporation. That subpoena was disobeyed. Under Section 22 (c) of the Act, which provides [4] that where such a subpoena is not obeyed the remedy of the Commission will be to come before a District Court, and the Court then upon a proper showing is required to order that the subpoena be obeyed. That was done in this case. A hearing was held here several days, I understand—that was

before I was associated with the Commission—and on June 1, 1943 this Court ordered that the books and records specified in the subpoena should be produced before the Securities and Exchange Commission on June 8 of 1943.

An appeal was then taken by the respondent and, after lengthy appeal time, on December 7, 1944, it reached the Supreme Court of the United States and it denied the petition for a certiorari.

Then acting under the powers which the officers appointed by the order had, on January 16th there was served upon the respondent Young by mail, and I am informed also by mail a notice was sent to his counsel, directing him to produce those books and records on January 24th.

Now I am not at all sure that that sort of a step was necessary inasmuch as this Court had made an order directing that the subpoena be obeyed and the books and records be produced—that was stayed during the force and effect of the appeal—but on December 7, 1944, when the mandate came down from the Circuit Court and was spread on the records of this Court, I think there was a positive duty then on the part of the respondent to, within a reasonable time, comply with the [5] order of the Court. That was not done, and on January 24th we came before this Court with an affidavit and an order to show cause and asked that the order issue. The return date set forth by the Court was February 5, 1945, and the matter had been continued then to these various dates, February 8,

1945, then February 26, from February 26 to May 28, to July 25 and to today.

I think it clearly shows disrespect and contempt for the Court's order made over two years ago when we are met this late date with the type of affidavit of the type and nature the respondent has filed.

The Court: Let me get straight on some of these dates.

The mandate was spread on December 7, 1944. Then after that the Commission amended the order of designation of the examining officer that was involved in the amendment.

Mr. Cuthbertson: I am not certain of that.

The Court: It says here that it was further amended by the designation of Charles R. Burr.

Mr. Cuthbertson: My impression was he had been appointed some time prior to that.

The Court: Well, it appears here it was on January 6th. I suppose for that reason that the letter was addressed to Mr. Young because there was a different person for him to appear before than that contained in the mandate.

What did you say happened in February?

Mr. Cuthbertson: Nothing happened. [6]

The Court: You said this order directed him to appear on January 24th.

Mr. Cuthbertson: That is right. The return date of the order to show cause which was obtained on January 24th was February 5, 1945.

The Court: That was just the order to show cause on this contempt?

Mr. Cuthbertson: Yes, your Honor.

The Court: All right, May I hear from you?

Mr. Lavine: We have submitted the affidavits to counsel and, as your Honor has pointed out, the only thing we have done here is send a letter with a new officer stating that Mr. Burr was going to call at the offices of the Penfield Company on January 24, 1945. Now Mr. Burr was not the person who was designated and, according to the affidavits of Mr. Young and his wife, he was out of the city at the time, and his counsel was out of the city also at the time. He was not back in the city until February. So it was merely a request by Mr. Burr. There was no subopena or any other notice served on Mr. Young other than a letter in the form of this letter by Mr. Burr, who was not the officer designated in the former order. He said he would call, and that is all they did. I think that is insufficient upon which to predicate a contempt proceeding which is a quasi-criminal proceeding in this matter.

The Court: The order that was made on June 1, 1943 and [7] from which the appeal was taken ordered and directed Young to produce certain books and records or, in accordance with the stipulation and agreement of the parties made in open court, that the books, papers and documents herein ordered to be produced as aforesaid in lieu of their physical production as heretofore ordered shall be made available to such officer and employees of the Securities and Exchange Commission as may be

designated at the office of the respondent at 8900 Beverly Boulevard, Los Angeles, California.

Now it does not appear to me that there was any particular person designated in the order, it was an officer of the Securities and Exchange Commission. Now they merely advised Young that they would call on January 24th. They did call on January 24th, according to the affidavit, which is not denied, at 8900 Beverly Boulevard.

Mr. Lavine: We can't tell, your Honor. The letter is addressed to another address.

The Court: What letter?

Mr. Lavine: The letter of Mr. Burr to Mr. Young, is addressed to 2427 South Robertson Boulevard.

The Court: Yes, it is, and it says that they presented themselves at the office of the Penfield Company of Los Angeles. I don't know whether that was 8900 Beverly Boulevard or not.

Mr. Cuthbertson: I am informed by Mr. Burr, whose affidavit that is, that they called at the Beverly Hills office [8] and also at the Robertson address.

The Court: It isn't in the affidavit. Do you wish to put him on the witness stand?

Mr. Lavine: I don't.

The Court: The affidavit of the defendant Young indicates that he was absent from the city from January 11 to February 3, so the question now is whether or not his mere absence from the city is sufficient to exculpate him from the order of the Court.

I think that the order is pretty definite, that he should have made the books and records available to Mr. Burr, and even though he were absent from the city I think he should have made some provision so that the examination could have been had, because the order to produce the books and records was made in the alternative, to examine them at their office as an accommodation to the defendant in order to prevent him from having to physically bring the books and papers to the office and interrupt his business. I think the order is definite enough that it should have been obeyed.

The question now is whether or not, as I have indicated, his absence from the city is sufficient to excuse him. I don't believe that it is, Mr. Lavine. I think that he should have provided some means or some person so that they could have been available.

Mr. Lavine: Your Honor, might I call your attention to the fact that the mandate, while the mandate came down in [9] December, that some time in January or—I am not sure as to the time, but subsequent to the December time—there was a request made for these books and instead of making the request to Mr. Young they sought out Mr. Black, who was the president of the Penfield Company, and they served papers on him. He made a return with respect to those, and the hearing was had before McCormick in respect to that.

The Court: That was in connection with a Grand Jury subpoena?

Mr. Lavine: No, I think it was in connection

with both subopenas. I think there were two subpoenas served on him.

The Court: That may be possible because the Grand Jury subpoena was transferred to me for hearing.

I think, Mr. Lavine, that the order was definite enough and he knew what was wanted and I think that he ought to be found guilty here of contempt in this matter.

Mr. Young is present?

Mr. Lavine: Yes, your Honor.

The Court: That will be the order of the Court, that he is guilty of contempt.

Are you ready for sentence?

Mr. Lavine: Yes, your Honor.

The Court: Come forward, Mr. Young.

Mr. Young: Might I say a word, your Honor?

The Court: I think you had better talk to your counsel.

Mr. Lavine: Your Honor, the defendant wishes to point [10] out to your Honor that in connection with the matter he was not aware of the time at the time that the mandate came down as to what further proceedings might be had in connection with the matter and he was trying to make a living and went out of the city.

The Court: He had good counsel and if he had consulted him when the mandate came down I think he would have been advised of what he was obliged to do.

Mr. Lavine: Unfortunately I went out of the city too, your Honor, so we were both out of the

city. I want your Honor to take that into consideration.

The Court: Very well. The order will stand that the defendant be adjudged guilty of contempt.

Do you have anything to say in connection with the disposition of this matter, Mr. Cuthbertson?

Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the [11] Penfield matter.

Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether

that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid.

Mr. Lavine: Could we have a couple of hours, your Honor?

The Court: A stay of execution until tomorrow morning at 10:00 o'clock.

[Endorsed]: Filed Oct. 4. 1945. [12]

[Endorsed]: No. 11173. United States Circuit Court of Appeals for the Ninth Circuit. Securities and Exchange Commission, Appellant, vs. The Penfield Company of California and A. W. Young, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11173

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

v.

THE PENFIELD COMPANY OF CALIFORNIA

Respondent.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY

The appellant intends to rely in its appeal upon the point, as listed in the Statement of Points filed with the District Court, that having adjudged Young, the Secretary-Treasurer of the respondent company in contempt, the District Court erred in ordering Young to pay a fine of $50.00 instead of imposing a remedial penalty calculated to coerce Young to produce or allow inspection of the books and records of the respondent pursuant to the District Court order of June 1, 1943, and;

The parts of the record necessary for a consideration of said point are the items specified in the

Designation of Contents of Record on Appeal dated October 2, 1945 and filed with the District Court.

Dated: November 1, 1945.

ROGER S. FOSTER
Solicitor

HOWARD R. JUDY
Regional Administrator

G. M. CUTHBERTSON
Attorneys for Securities and Exchange Commission

Received a Copy of the Within Document This 1st Day of November, 1945.

.....
Attorney for Respondent

[Endorsed]: Filed November 2, 1945. Paul P. O'Brien, Clerk.